

IN THE  
MISSOURI SUPREME COURT

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|                    |   |              |
|--------------------|---|--------------|
| MARK DOUGAN,       | ) |              |
|                    | ) |              |
| Appellant,         | ) |              |
|                    | ) |              |
| vs.                | ) | No. SC 85274 |
|                    | ) |              |
| STATE OF MISSOURI, | ) |              |
|                    | ) |              |
| Respondent.        | ) |              |

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI  
THIRTEENTH JUDICIAL CIRCUIT, DIVISION ONE  
THE HONORABLE GENE HAMILTON, JUDGE

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APPELLANT’S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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Mark A. Grothoff, MOBar #36612  
Attorney for Appellant  
3402 Buttonwood  
Columbia, Missouri 65201-3724  
Telephone (573) 882-9855  
FAX (573) 875-2594

## **INDEX**

|                               | <u>Page</u> |
|-------------------------------|-------------|
| TABLE OF AUTHORITIES.....     | 2           |
| JURISDICTIONAL STATEMENT..... | 3           |
| STATEMENT OF FACTS.....       | 4           |
| POINT RELIED ON .....         | 7           |
| ARGUMENT .....                | 8           |
| CONCLUSION.....               | 13          |
| APPENDIX .....                | A1          |

## **TABLE OF AUTHORITIES**

### **Page**

#### **CASES:**

|   |      |
|---|------|
| <u>Moss v. State</u> , 10 S.W.3d 508 (Mo. banc 2000).....                                   | 7-8  |
| <u>State ex.rel. Vee-Jay Contracting Co. v. Neill</u> , 89 S.W.3d 470 (Mo. banc 2002) ..... | 7,9  |
| <u>State v. Geiler</u> , 866 S.W.2d 863 (Mo. App. E.D. 1993).....                           | 7,11 |
| <u>State v. Kelly</u> , 966 S.W.2d 382 (Mo. App. E.D. 1998).....                            | 7,9  |

#### **CONSTITUTIONAL PROVISIONS:**

|   |     |
|---|-----|
| United States Constitution, Amendments XIV.....           | 7-8 |
| Missouri Constitution, Article I, Sections 10 and 14..... | 7-8 |
| Missouri Constitution, Article V, Section 3 .....         | 3   |

#### **STATUTES:**

|                             |   |
|-----------------------------|---|
| Section 569.080, RSMo. .... | 4 |
| Section 574.010, RSMo. .... | 4 |

#### **RULES:**

|                                |          |
|--------------------------------|----------|
| Supreme Court Rule 29.15 ..... | 3,5,7-13 |
| Supreme Court Rule 83.04 ..... | 3,6      |

### **JURISDICTIONAL STATEMENT**

This appeal arises from the denial of appellant's Rule 29.15 motion without an evidentiary hearing in the Circuit Court of Boone County, Missouri, the Honorable Gene Hamilton presiding. After the Missouri Court of Appeals, Western District, issued its opinion in case No. WD 61148, this Court granted appellant's application for transfer pursuant to Rule 83.04. This Court has jurisdiction of this appeal under Article V, Section 3, Missouri Constitution.

## **STATEMENT OF FACTS**

Appellant was charged by information with the Class C felony of tampering in the first degree in violation of Section 569.080.1(2), RSMo. and with the Class B misdemeanor of peace disturbance in violation of Section 574.010, RSMo. (L.F. 6).<sup>1</sup> The state subsequently entered a nolle prosequi as to the peace disturbance count (Tr. 2-3; L.F.2), and the case on the tampering count proceeded to trial on January 31, 2001 (Tr. 1).

At trial, the state and appellant presented evidence and rested (Tr.86-152, 154-197). After deliberation, the jury returned a verdict of guilty (Tr. 214; L.F. 19). On March 19, 2001, appellant was fined \$5,000 with execution of \$4,500 of the fine suspended, and appellant was placed on supervised probation for five years (Tr. 221; L.F. 23-25). Appellant was also ordered to pay restitution, to complete 100 hours of community service, and to complete counseling (Tr. 221; L.F. 23-25).

Appellant filed his notice of appeal of his conviction on March 29, 2001 (L.F. 27). Subsequently, on November 16, 2001, appellant filed a motion to

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<sup>1</sup> The record on appeal will be designated as follows: the transcript from appellant's trial will be designated (Tr.); the legal file from appellant's direct appeal will be designated (L.F.); and the legal file for this appeal of appellant's post-conviction motion will be designated (PCR L.F.).

dismiss his direct appeal (Appendix, pp. A1-A3), and on November 20, 2001, the Western District Court of Appeals issued its mandate dismissing appellant's direct appeal (Appendix, p. A4).

On January 23, 2002, appellant filed a pro se motion to vacate, set aside, or correct his judgment or sentence pursuant to Rule 29.15 (PCR L.F. 4). The state responded by filing a motion to dismiss appellant's post-conviction motion (PCR L.F. 10). The state asserted that appellant did not meet the requirements of Rule 29.15 because a direct appeal had not been taken of appellant's conviction and appellant had not been incarcerated (PCR L.F. 10). On February 15, 2002, appellant filed a response to the state's motion, pointing out that he was in compliance with Rule 29.15(b) because a direct appeal had been filed and an appellate mandate issued (PCR L.F. 12-13).

On February 25, 2002, the motion court dismissed appellant's post-conviction motion because appellant "...has never been incarcerated in DOC[.]" (PCR L.F. 14; Appendix, p. A5). Appellant filed a notice of appeal of the motion court's judgment on March 6, 2002 (PCR L.F. 16).

On February 28, 2003, the Western District Court of Appeals issued an opinion dismissing appellant's post-conviction appeal (Case No. WD 61148; Appendix, pp. A6-A9). The Western District found that Rule 29.15 did not create remedies beyond those provided by a writ of habeas corpus, and that because appellant was not incarcerated; he lacks standing under Rule 29.15 (Appendix, p.

A9). This Court subsequently granted appellant's application for transfer pursuant to Rule 83.04 (Appendix, p. A10).

## **POINT RELIED ON**

### **I.**

**The motion court clearly erred in dismissing appellant's Rule 29.15 motion on the basis that appellant has not been incarcerated. The motion court's dismissal of appellant's motion was in violation of Rule 29.15 in that appellant had timely filed a notice of appeal of his conviction to the Western District Court of Appeals and his post-conviction motion was timely filed sixty-four days after that court's mandate was issued. Appellant was prejudiced and denied his rights to due process of law and access to the courts under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 14 of the Missouri Constitution because he is entitled to proceed in accordance with the provisions of Rule 29.15 but the motion court's actions deprived him of this right.**

State v. Geiler, 866 S.W.2d 863 (Mo. App. E.D. 1993);

State v. Kelly, 966 S.W.2d 382 (Mo. App. E.D. 1998);

State ex.rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470 (Mo. banc 2002);

Moss v. State, 10 S.W.3d 508 (Mo. banc 2000);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sects. 10 and 14; and

Rule 29.15.



## **ARGUMENT**

### **I.**

**The motion court clearly erred in dismissing appellant's Rule 29.15 motion on the basis that appellant has not been incarcerated. The motion court's dismissal of appellant's motion was in violation of Rule 29.15 in that appellant had timely filed a notice of appeal of his conviction to the Western District Court of Appeals and his post-conviction motion was timely filed sixty-four days after that court's mandate was issued. Appellant was prejudiced and denied his rights to due process of law and access to the courts under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 14 of the Missouri Constitution because he is entitled to proceed in accordance with the provisions of Rule 29.15 but the motion court's actions deprived him of this right.**

The scope of appellate review of the denial of a Rule 29.15 motion is whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508 (Mo. banc 2000). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Id.

The motion court clearly erred in dismissing appellant's Rule 29.15 motion. The motion court made a glaring mistake when it concluded that appellant's pro se motion should be dismissed because appellant had not been delivered to the department of corrections. Likewise, the Western District Court of Appeals was

erroneous in finding that, because appellant was not incarcerated, he lacks standing under Rule 29.15. The fact that appellant had not been incarcerated is irrelevant because appellant timely filed a notice of appeal of his conviction (L.F. 27).

On November 16, 2001, appellant filed a motion to dismiss the direct appeal of his conviction (Appendix, pp. A1-A3), and on November 20, 2001, the Court of Appeals issued its mandate dismissing appellant's direct appeal (Appendix, p. A4). Appellant's voluntary dismissal of his direct appeal has no bearing on his post-conviction rights. The provisions of Rule 29.15(b) apply equally to a mandate issued after dismissal of a direct appeal. See: State v. Kelly, 966 S.W.2d 382, 384-385 (Mo. App. E.D. 1998).

Supreme Court Rules are interpreted by applying principles similar to those used for state statutes. State ex.rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470, 471-472 (Mo. banc 2002). This Court's intent is determined by considering the plain and ordinary meaning of the words in the Rule. Id. at 472.

The Western District Court of Appeals has misinterpreted Rule 29.15, and in so doing, has overlooked the plain language of the rule and the central fact in the case. The Western District's analysis completely ignores the fact that appellant filed a direct appeal of his conviction, that a mandate was issued, and the plain language of Rule 29.15.

Rule 29.15 states, in pertinent part:

(a) A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgment or sentence sought to be vacated, set aside or corrected was taken, the

motion shall be filed within ninety days after the date the mandate of the appellate court is issued affirming such judgment or sentence. If no appeal of such judgment or sentence was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections.

Nothing in Rule 29.15 limits the rule to persons who have been incarcerated. The rule is absolutely silent in this regard. Incarceration is mentioned only in regard to a case in which a direct appeal has not been filed, and that is not the situation here.

The Eastern District Court of Appeals does not agree with the Western District's analysis. In State v. Geiler, 866 S.W.2d 863 (Mo. App. E.D. 1993), the Eastern District found that, by its language, Rule 29.15 applies to a person convicted of a felony without regard to the penalty imposed. Id. at 863-864.<sup>2</sup>

Pursuant to the plain language of Rule 29.15, because an appeal of appellant's conviction was taken, appellant had ninety days from the issuance of the appellate court's mandate in which to file his post-conviction motion. Rule 29.15(b). On January 23, 2002, appellant timely filed a pro se motion for post-conviction relief pursuant to Rule 29.15 (PCR L.F. 4). Appellant's post-

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<sup>2</sup> The state conceded that Rule 29.15 applies regardless of the penalty. Geiler, id. at 864.

conviction motion was filed sixty-four days after the mandate was issued in his direct appeal, clearly within the ninety day limit set by Rule 29.15(b).

Thus, appellant was entitled to file a post-conviction motion pursuant to Rule 29.15, and timely did so. Appellant has established that the motion court's dismissal of his Rule 29.15 motion was clearly erroneous. Therefore, appellant respectfully requests that this Court reverse the dismissal of his Rule 29.15 motion and remand with directions to the motion court to reinstate appellant's motion for post-conviction relief.

## **CONCLUSION**

For the foregoing reasons, as set out in appellant's Argument I, appellant respectfully requests that this Court reverse the motion court's dismissal of appellant's Rule 29.15 motion and remand with directions to the motion court to reinstate appellant's motion.

Respectfully Submitted,

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Mark A. Grothoff, MOBar #36612  
Attorney for Appellant  
3402 Buttonwood  
Columbia, Missouri 65201-3724  
(573) 882-9855

### **Certificate of Compliance and Service**

I, Mark A. Grothoff, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 1,813 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in April, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 17<sup>th</sup> day of July, 2003, to John M. Morris, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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Mark A. Grothoff